King IV: Is the crown shiny enough?*

(International Section: South Africa)

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1. Introduction and Background

Directors' duties and good governance are not only regulated in terms of legislation and the common law. Important recommendations are also contained in Codes of Best Practice.[1]

King I was issued in 1994 and replaced by *King II* in 2002.[2] *King I* mainly dealt with financial and regulatory aspects of corporate governance, and was ground-breaking at the time. However, the evolving global economic environment and legislative developments at the time have necessitated that *King I* be updated. To this end the King Committee developed *King II* in 2002. *King II* acknowledged that there is a move away from the single bottom line (that is, profit for shareholders) to a triple bottom line, which embraces the economic, environmental and social aspects of a company's activities.

The *King II Report* was revised and *King III* became effective on 1 March 2010.[3] The *King III Report* applied to all entities regardless of the manner and form of incorporation

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[1] On the *King III Report* see Irene-marie Esser & Piet Delport 'The Duty of Care, Skill and Diligence: the *King Report* and the 2008 Companies Act (2011) August *THRHR* 449-455 and Irene-marie Esser 'The Protection of Stakeholder Interests in terms of the South African *King III Report* on Corporate Governance: An Improvement to *King II*?' (2009) 21 *SA Merc LJ* p.188. See further Havenga, MK (ed) *Company Secretarial Practice* (2016), Ch 7 on the *King Reports*.

[2] Hereafter *King II.* See in general, Philip Armstrong 'The King Report on Corporate Governance' (1995) 3 *Juta's Business Law* p.65*.*

[3] The *King III* Committee consisted of eleven subcommittees, namely: Boards and directors; Accounting and auditing; Risk management; Internal audit; Integrated sustainability reporting; Compliance and stakeholder relationships; Business rescue; Fundamental and affected transactions; IT governance; Alternative dispute resolutions; and Editing.

or establishment and whether they are in the public, private or non-profit sectors.[4] Despite this aspiration, not all sectors accepted and agreed to be bound by *King III*. *King III* also refined the triple bottom line concept and used the term 'triple context'. This was an acknowledgement of the fact that the dimensions of the economy, the society and the natural environment are all intertwined and not separate. It is this thinking that had also led to recommending integrated reporting, a revolutionary idea which has now been taken up internationally.

During 2014 it was announced that *King III* would be updated.[5] A draft was released on 15 March 2016 and public comments were due on 15 May 2016. On 1 November 2016 the final Report was launched.[6] Disclosure on the application of *King IV* is effective in respect of financial years starting on or after 1 April 2017 but immediate transition was encouraged. *King IV* replaced *King III* in its entirety. The Institute of Directors of Southern Africa (IODSA) indicated that *King IV* will be building on the content of *King III*. The same subject matter will be covered but consideration will be given to developments that include, but are not limited to, the following areas: executive and directors' remuneration, integrated reporting, responsible investing and linkage with the Code for Responsible Investing in South Africa (CRISA),[7] the evolving role of social and ethics committees, mandated audit firm rotation and tendering, information security and protection, strategic risks and dependencies, group governance, board diversity and combined assurance.[8]

The aim of this article is to provide a detailed analysis of *King IV* with the view to understand the scope, application and operation of the Report. We will also consider

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[4] The *King Report on Governance, 2009* available at www.iodsa.co.za (hereafter the *King III Report* or *King III Code*). It is two separate documents, but together they are referred to as *King III*. See Loubser 'The King reports on corporate governance' in Esser and Havenga *Corporate Governance Review 2012* (Lexisnexis) (hereafter Loubser in Esser and Havenga) p.22. See par 13 of the Introduction and Background part in the *King III Report* on its application.

[5] See for all information relating to *King IV*: http://www.iodsa.co.za/?page=KingIV. The content of *King IV* was developed by building on the strengths of *King III*. The drafting of *King IV* was led by the *King IV* lead (Ansie Ramahlo) and various team members. The consultation process was widely consultative. They conducted various consultation meetings instead of making use of standing working groups.

[6] http://www.iodsa.co.za/page/KingIVReport.

[7] See http://www.iodsa.co.za/?page=crisaresourcecentr and Part 5.5, Principle 17 of *King IV*.

[8] Q&A document of the IODSA on the *King IV Report* available at: http://www.iodsa.co.za/page/AboutKingIV.

whether there was indeed a need for an updated Report, what the differences will mean in practice and whether or not it has been drafted in a clear and concise manner. The new 'apply and explain' approach will specifically be focused on.

King IV has been in force since 1 April 2017 and organisations have to ensure that they apply *King IV*.[9] This article should provide the necessary information and analysis to assist the relevant stakeholders in understanding the application and contents of *King IV*. Some robust academic views on the need for and structure of the *King IV* are also provided. Our views should be of assistance to international academics and policy makers as to whether or not *King IV* is a model that can be transported to other legal systems or global instruments.[10]

2. King IV

2.1 Motivation and rationale

The King Committee motivated its decision to draft another King Report as one based on, first, significant corporate governance and regulatory developments, locally and internationally,[11] which need to be taken into account and, secondly, that *King IV* must be accessible to more organisations and entities. Most listed companies are generally applying *King III*.[12] Other organisations like non-profit organisations, private companies

[9] *King IV* operates on a different basis namely 'apply and explain' which will mean a different reporting culture.

[10] The application of *King IV* can, however, be problematic. Steinhoff International Holdings N.V. ('Steinhoff') was the largest ever corporate collapse in South African history, with ZAR100 billion wiped out upon resignation of the CEO, Markus Jooste, on 5 December 2017 following the refusal of the auditors to sign-off on the financial statements for 2017 due to accounting irregularities. Steinhoff is registered in the Netherlands, it has its 'business headquarters' in Stellenbosch, South Africa, is listed on the Frankfurt Stock Exchange in Germany with a secondary listing on the JSE Ltd in South Africa. The possibility of regulation (and Code) arbitrage is clear, and whether or not *King IV* applied to Steinhoff is difficult to determine due to the multiplicity of business and listing jurisdictions. Steinhoff itself said that it complies with the Dutch Corporate Governance Code: Steinhoff International Holdings N.V. Annual Report 2016 ('Steinhoff Annual Report 2016') at p.28.

[11] *King IV*, part 2, Introduction.

[12] On the application of *King III* see: Waweru N 'Determinants of quality corporate governance in Sub-Saharan Africa' (2014) p.29 *Managerial Auditing Journal* 455 – 485 who conducted a study during 2014 to examine the factors influencing the quality of corporate governance in South Africa (SA) and Kenya. During March 2013 the IoDSA published a report on the perceptions and practice of *King III* on South African companies (IoDSA Perceptions and Practice of King III in South African companies (March 2013)). See also a study conducted by the Integrated Reporting & Assurance Services during 2012 entitled 'Review of sustainability reporting in South Africa as per the Global Reporting Initiative (GRI) Guidelines'. Detailed findings are presented in this Review document. It is, inter alia, stated that: 'Unlike most countries, sustainability reporting in South Africa is less of a 'nice to have' than a 'need to have',

and entities in the public sector have experienced challenges in interpreting and adapting *King III* to their particular circumstances, due to *King III* mainly being aimed at profit companies.

It is stated in *King IV* that emerging issues and corporate governance developments, since the release of *King III*, have now been addressed in *King IV*[13] and reporting and ethics have been highlighted.[14] In the context of reporting it is important to take the international integrated reporting framework[15] into account. Integrated reporting is an outcome of integrated thinking. It was argued that this has to be part of the actual report and that a mere practice note will not be sufficient to address this. Organisational ethics (as applied internally at an organisation) did not receive a lot of

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particularly for listed companies. Whereas consumer, shareholder and/or other stakeholder requests for additional information drive reporting trends in the more developed economies of Europe and North America, the key motivation for integrated sustainability reporting in our context is centred around the listing requirements of the Johannesburg Stock Exchange (JSE).' Also 'Regardless of the accuracy of these figures, the results clearly suggest that South Africa is among a rare breed of countries successfully implementing the GRI G3 Guidelines as a means for demonstrating maximum transparency and accountability'. See Irene-marie Esser 'Corporate Governance: Soft Law Regulation and Disclosure - The Cases of the United Kingdom and South Africa' in Du Plessis and Low (eds) *Corporate Governance Codes for the 21st Century International Perspectives and Critical Analyses* (Springer, 2017) on compliance with *King III*. Finally see: Jansen van Vuuren C, Schulschenk J 'Perceptions and practice of King III in South African Companies' (March 2013) University of Pretoria and the Institute of Directors Southern African; Pamburai HH, Chamisa E, Abdulla C, Smith C 'An analysis of corporate governance and company performance: a South African perspective' (2015) p.29(2) *South African Journal of Accounting Research* pp.115-131; Solomon J, Maroun W 'Integrated Reporting: The influence of King III on social, ethical and environmental reporting' (2012) ACCA.

[13] *King IV*, part 2, page 28.

[14] Guest speech by Ansie Ramahlo (Project Lead for *King IV*) delivered at the University of Johannesburg during July 2016. See also an interview conducted with Mervyn King (by C Duff of Trialogue) where he states that developments have occurred since *King III*. He specifically refers to integrated reporting, the increasing important role of the internal audit function and that the internal auditor should have an advisory and independent role. He also refers to ethical taxation.

[15] See http://integratedreporting.org/resource/international-ir-framework/. The International Integrated Reporting Council (IIRC) is a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs. Together, this coalition shares the view that communication about value creation should be the next step in the evolution of corporate reporting. The International Framework has been developed to meet this need and provide a foundation for the future. See *King IV*, part 5.2 on integrated reporting.

attention in *King III*.[16] Views on the composition of the board[17], assurance, internal auditing, auditor independence, the increasing role of social and ethics committees, new perspectives on risk, technology and information, an elevated focus on compliance, delegation to committees, performance evaluations of the governing body, remuneration and shareholder activism are some of the relevant developments that were taken into account when drafting *King IV*.[18]

It is submitted, by the King Committee, that the above issues could have been dealt with through an update of *King III*. However, in addition to provide for the above developments the aim was to also to make this Code accessible to all organisations and to address mindless compliance. These additional objectives required structural changes to *King III* which necessitated a re-write.

This is linked to the fundamental concepts and philosophies of *King IV*.[19] The principles of *King IV* embody the aspirations of the journey towards good governance and guide

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[16] Ethics has been dealt with in *King III* in chapter 1 (Ethical Leadership and Corporate Citizenship), but the focus was not on organisational ethics. Principle 1 of *King IV* states that 'the governing body should lead ethically and effectively'. Members of the governing body should exhibit in their conduct integrity, competence, responsibility, accountability, fairness and transparency. Principle 2 deals with organisational ethics. An ethical culture should be encouraged. The underpinning philosophies of *King IV* (part 2, p.22) are integrated thinking (making business decisions in an integrated manner and finally reporting on value creation and performance), that the organisation is an integral part of society (i.e. organisations operate in a societal context, which they affect and by which they are affected), corporate citizenship (organisations, as corporate citizens, have rights and responsibilities), sustainable development (organisations should focus on the long term, an organisation should enhance its resources and the relationships on which it relies) and stakeholder inclusivity (balancing the needs of all relevant stakeholders in line with a stakeholder inclusive approach).

[17] Recommendations that a board should have a balance of skills, diversity, experience etc and that this balance can only be achieved if the specific needs of the organisation are taken into account are relevant here. Independence is but one consideration.

[18] *King IV*, part 2, pp.28-31 for the highlights of *King IV*. In part 2, p.27 the distinguishing features of *King IV* are listed. It states that *King IV* is based on an outcome-based approach. By achieving the principles the realisation of the intended governance outcomes is optimised. These outcomes include ethical culture, good performance, effective control and legitimacy. It is drafted to be more accessible to users and to reinforce governance as a holistic and integrated set of arrangements. Reference is made to 'mindful compliance'. Principles are achieved by mindful consideration and application of the recommended practices. Sector supplements (part 6) are also provided to help organisations to implement *King IV* with their own practises and circumstances in mind. Broader terms of reference are thus also used, like 'governing body' and 'organisation'. The main distinguishing feature is probably the new 'apply and explain' approach. See part 3 of *King IV* on this approach.

[19] *King IV*, part 2. All principles are framed as aspirations that all organisations must strive towards in their journey to good corporate governance. '*King IV* advocates an outcomes-based approach. By achieving the principles the governance outcomes (ethical culture, good performance, effective control and legitimacy) will be realised'.

to what organisations must strive for by the application of governance practices.[20] Mindless compliance and a quantative approach is not the aim. *King IV* rather aims to have a qualitative approach where recommended practices are implemented to achieve the principles and realise the intended governance outcomes. The objectives of *King IV* are framed as the promotion of good governance as integral to running a business which should deliver benefits that include an ethical culture and the enhancement of performance, reputation and legitimacy. Also, to broaden the acceptance of good governance by making it accessible and fit for all organisations.[21] Corporate governance should be viewed as a holistic set of arrangements that must be implemented in an integrated manner. It is not merely about structure and process, but about ethical consciousness and behaviour.[22] In the first draft report of *King IV* reference was made to three paradigm shifts in corporate thinking that are specifically relevant.[23] First, a shift from financial capitalism to inclusive capitalism where the view is that inclusive capitalism will take employment, transformation and the provision of all sources of capitals[24] into account. Secondly, a move from silo reporting to integrated reporting which is in line with an inclusive, sustainable capital market. Finally, a shift from short-term capital markets to long-term sustainable markets where value has to be created in a sustainable manner. Performance in terms of all-inclusive values should thus be assessed over the longer term.

The main aim of *King IV* can thus be summarised as a report that focuses on mindful compliance, adding value across the board where corporate governance is defined as:

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[20] *King IV*, p.36.

[21] An organisation is defined in the 'Glossary of Terms' as a company, retirement fund, non-profit organisation, state-owned entity, municipality, municipal entity, trust, voluntary organisation, and any other juristic person regardless of its manner of incorporation.

[22] *King IV*, part 2, p.22.

[23] First draft of *King IV*, part 1, para 4. See also now, the Foreword of *King IV*.

[24] As set out in the International Integrated Reporting Council's Integrated Reporting (<IR>) Framework as financial, manufactured, human, intellectual, natural and social and relationship capital.

"… the exercise of ethical and effective leadership[25] by the governing body towards the achievement of the following governance outcomes:

- Ethical culture
- Good performance
- Effective control
- Legitimacy."[26]

This is done by way of *governance outcomes, principles and practices.*[27]

2.2 Scope and contents

King IV consists of 7 parts and operates in terms of practices, principles and governance outcomes; the building blocks of the Code.[28] The principle will state what organisations should strive toward. The difference between a principle and a practice can be explained, with reference to *King III*, as follows: in *King III* it is *recommended* that the board should have a mixture/balance of executive and non-executive directors with the majority being non-executive directors and the majority of the non-executive directors should be independent.[29] This recommendation in *King III* is really a *practice* that tells you what to do; it is not a principle providing a universal governance aspiration which is basic and fundamental to good governance. In *King IV* the *principle* is: 'The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.'[30] The fact that there must be a mixture of

[25] Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency. Effective leadership is results-driven. It is about achieving strategic objectives and positive outcomes. Ethical and effective leadership should complement and reinforce each other.

[26] *King IV*, part 2, p.36.

[27] *King IV*, part 2, para 3.

[28] *King IV*, part 4 for the application and disclosure of *King IV*.

[29] See *King III*, principle 2.18.

[30] Principle 7 in *King IV*. This was stated expressly not to be the case in Steinhoff: Steinhoff Annual Report 2016 at p.29. It should be noted that Steinhoff had a two-tier board, consisting of the management board and the supervisory board, who are accountable to Steinhoff's shareholders. Duties, fiduciary and otherwise, are to the company and not the shareholders in South African law: see e.g. s 76 of the 2008 Companies Act and *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA). Duties towards shareholders can, however, be conferred on the board in terms of e.g. a separate agreement or a provision in the Memorandum of Incorporation: *Henochsberg on the Companies Act 71 of 2008* p.298(1). Decisions on material matters are reserved by the management board, which is the executive body entrusted with the management of the company's operations and strategy, as well as the

executive and non-executive directors is a *practice*. The *practices* will thus support the *principles* (in this case to have a balanced board) and this will lead to *governance outcomes*. Governance outcomes are thus the benefits that organisations could realise if the underlying principles are achieved. With *King IV* the focus is on the principles which embody the aspirations towards the journey of good governance. Practices may be scaled in accordance with proportionality considerations (size of turnover, resources, extent and complexity of activities are some factors to be taken into account regarding proportionality).[31] With *King III* the focus was thus on practices and whether or not you have it in place and thus able to tick the right boxes. This is thus no longer the aspiration.

King IV is, similar to its predecessors, a set of voluntary principles and practices.[32] Some of these practices have been legislated[33] and is in line with international hybrid systems of good governance.[34] The main objective with *King IV* was to make it applicable to as many organisations as possible and to make the practices adaptable as to the type of organisation. In view of this *King IV* is based on an 'apply and explain' approach of disclosure, moving away from the more general approach of 'comply or explain'. As all principles are phrased as aspirations and ideals, that organisations

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operations of the group, subject to supervision by the supervisory board: Steinhoff Annual Report 2016 p.30. South African company law does not recognise the two-tier board structure (see e.g. s 66 of the 2008 Companies Act) and the application of *King IV* in this respect could be difficult. Before the 2008 Companies Act came into operation on 1 May 2011, *King III* expressly stated that the two-tier structure is not preferred, although this structure was, by implication, also not authorised in terms of the repealed Companies Act 61 of 1973 (*King III*, para 62). The supervisory board must report to the shareholders in general meeting in respect of achievement of the company's objectives; the corporate strategy and risks inherent in the business activities; the structure and operation of the internal risk management and control systems; the financial reporting process; compliance with applicable laws and regulations; and relations with shareholders: Steinhoff Annual Report 2016 p.34. It would appear that at least in respect of risk and the financial reporting process this duty was not complied with.

[31] *King IV*, p.36.

[32] *King IV*, p.35.

[33] For example, the social and ethics committee provided for in s 72 of the 2008 Companies Act.

[34] See here, other systems like the UK: FRC (Sept, 2014) *The Corporate Governance Code*, paras 1 and 3. The notion that implementation of the Code should be uniform was rejected from the beginning and it was argued that a 'one-size-fits-all' approach is not realistic. Therefore UK listed companies can 'opt-out' of the requirements of the Code, subject to providing valid reasons and justifications for doing so. This 'opt-out' procedure is preferred as it gives the board the discretion to not comply with a principle in the Code if it is not cost effective or inappropriate to the company's specific circumstances, subject to providing an explanation. See I Esser 'Corporate Governance: Soft Law Regulation and Disclosure - The Cases of the United Kingdom and South Africa' above.

should strive to achieve to give effect to the governance outcomes, application of the principles are assumed. The explanation that is given will be a high level disclosure of the practices that have been implemented and the progress that has been made in the journey towards giving effect to each principle.[35] Explanation should be provided in the form of a narrative account.[36] The detail provided in the narrative account should be guided by materiality and should enable stakeholders to make an informed assessment of the quality of the corporate governance of the specific organisation. In terms of the 'explanation' the organisation does not have to provide an explanation for each and every practice.[37] It is sufficient if it is stated that the organisation is achieving or working towards achieving the relevant governance outcome. More thinking and exercising of judgment will thus be required when 'applying and explaining' in terms of *King IV* compared to *King III*.

It is within the discretion of the governing body as to where disclosure should be made. This can be in the integrated report, social and ethics committee's report, online or printed. Disclosure can also be contained in more than one of these reports. Disclosure should at least be updated on an annual basis. A 'roadmap to disclosure' is provided.[38] This roadmap provides very good guidance on disclosure and how *King IV* will operate in practice. Disclosure should start by referencing to all the principles in the *Code* (there are 17 principles) and then explain, in narrative form, the matters that the *Code* recommends under each principle. The recommended practices associated with the principles should be considered. Only if necessary to demonstrate how their implementation supports the achievement of the principles, expanding on

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[35] *King IV*, part 3, para 5.1. This is a new approach. *King III* operated on the 'apply or explain' approach: See the UK's approach on 'comply or explain': Arcot S, Bruno V, Faure-Grimaud A 'Corporate governance in the UK: Is the comply or explain approach working?' (2010) 30(2) *International Review of Law and Economics* pp.193-201; Keay AR 'Comply or explain: In need of greater regulatory oversight?' (2014) 34(2) *Legal Studies* pp.279-304; Moore MT 'The end of 'comply or explain' in UK corporate governance?' (2009) 60 *Northern Ireland Legal Quarterly* pp.85-103.

[36] *King IV*, page 37. There is no need to disclose whether each practice has been implemented. The detail provided in the narrative should be guided by materiality. Stakeholders should be able to make an informed assessment of the quality of the organisation's governance. Specific disclosure recommendations are provided under each principle of the *King IV* Code. This should be used as the starting point. See, for example: para 10, page 45 of *King IV* for disclosure recommendations in relation to organizational ethics.

[37] *King IV*, part 3, para 5.2.

[38] *King IV*, p.38.

these practices is expected. Finally, completed disclosure should be assessed and the necessary enhancements should be implemented. The users of the report should be able to make an informed assessment on the governance in place. If necessary, alternative practices that have been implemented should be mentioned and how this will still support the recommended principles explained.[39]

Part 5 of *King IV* contains the *Code on Corporate Governance*. The *Code* consists of 17 Principles with numerous recommended practices to attain the relevant governance outcomes are of ethical culture, good performance, effective control and legitimacy.

Part 5.1 deals with leadership, ethics and corporate citizenship.[40] This part has 3 principles. Principle 1 states that the governing body should set the tone and lead ethically and effectively.[41] Practices include that members of the governing body should act with integrity, competence, responsibly in a fair and transparent manner with the necessary accountability. There should also be disclosure mechanisms by which it is holding itself to account for ethical governance. Principle 2 deals with organisational ethics which should be managed effectively. The establishment of an ethical culture is recommended and the relevant practices include that the governing body should assume responsibility for the governance of ethics, approve codes of conduct and ethics policies and exercise ongoing oversight of the management of ethics. In terms of Principle 3 the governing body should ensure that the organisation is a responsible corporate citizen. Practices include that the governing body should assume responsibility for corporate citizenship by setting direction for how it should be approached and addressed in the organisation. The governing body should also oversee the organisation's core purpose and values.

Part 5.2 deals with strategy, performance and reporting.[42] Principle 4 states that the governing body should appreciate that the organisation's core purpose, its risks and

[39] *King IV*, p.38.

[40] *King IV*, pp.43-46.

[41] Principle 1, p.43.

[42] *King IV*, pp.47-48.

opportunities, strategy, business model, performance and sustainability are all inseparable elements of the value creation process. Practices include that the governing body should approve a strategy by which the core purpose of the organisation is identified and its short-, medium-, and longer-term direction is set, that performance criteria should set measures across the whole of the economic, social and environmental context and that the organisation should assess and respond to actual short-, medium- and long-terms outcomes of its operations. Principle 5 deals with reporting. The reports and other disclosure should enable stakeholders to make an informed assessment of the performance of the organisation and its short, medium and long-term prospects. This is a major shift from *King III* where the focus was on the content of the integrated report, rather than reporting on the outcomes.

Part 5.3 deals with governing structures and delegation.[43] Principle 6 provides that the governing body should serve as the focal point and custodian of corporate governance in the organisation. The practices include that the governing body should provide direction and strategy, provide oversight of implementation and demonstrate accountability and transparency through disclosure. Principle 7 provides for the composition of the board. The board should comprise of a balance of skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively. The practices include that there should be an appropriate mix of executive, non-executive and independent members, that the majority of members on the board should be non-executive directors and the majority of these members should be independent and that the CEO should be appointed by the governing body. Recommended practices are also provided on the appointment process of the governing body, on the independence of the governing body and on the chair of the governing body. Principle 8 deals with the committees of the governing body. The governing body should ensure that its arrangements for delegation within its own structures promote independent judgement, and assist with balance of power and the effective discharge of its duties. Various recommended practices are provided dealing with the terms of reference of these committees, their roles and responsibilities, membership and delegation. The audit committee, nominations committee, risk governance committee, remuneration committee and social and ethics

[43] *King IV*, pp.49-60.

committee are specifically dealt with.[44] Principle 9 provides that the governing body should ensure that the performance evaluations of the governing body, its structures, its chair and members, the CEO and the company secretary result in continued improved performance and effectiveness. Delegation to management is dealt with under Principle 10 where it is stated that the governing body should ensure that the appointment of, and delegation to, competent executive management contributes to an effective arrangement by which authority and responsibilities are exercised. Recommended practices relating to the roles of the CEO and company secretary are provided.

Part 5.4[45] applies to the governance of functional areas with Principle 11 requiring that the governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives. Principle 12 deals with technology and information governance stating that it should be governed in such a way that it will support the organisation in defying its purpose and to set and achieve strategic objectives. The governing body should also govern compliance with laws and ensure consideration of adherence to non-binding rules, codes and standards (Principle 13). The governing body should also ensure that the organisation remunerates fairly, responsibly and in a transparent manner (Principle 14). The remuneration report and voting on remuneration[46] are also dealt with under the recommended practices. Principle 15 deals with assurance in the sense that the governing body should ensure

[44] The social and ethics committee and the audit committee are also required in terms of ss 72 and 94 respectively of the 2008 Companies Act. See here Nereus Joubert 'Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange' in: Visser, Pretorius (eds) *Essays in Honour of Frans Malan: Former Judge of the Supreme Court of Appeal* (2014) pp.183-195. The audit committee is a statutory (company) committee and not a board committee in terms of s 72 of the 2008 Companies Act and must perform the functions as provided for in s 94 of the 2008 Companies Act: see also *Henochsberg of the Companies Act 71 of 2008* p.358. However, in terms of s 94(7)(i), the board can assign other 'oversight functions' to the committee. In practice the risk functions are also assigned to the audit committee. Whether this is good practice will depend on the circumstances and the complexity of the company's business and operations. Assignment of risk management in the case of Steinhoff was, due to the extent and complexity of the business of the company, probably not prudent: Owen Skae 'Steinhoff is a dubious tangle of boards, bosses and big bucks' Businesslive.co.za (accessed 16 January 2018).

[45] *King IV*, pp.61-70.

[46] In addition to the requirements of s 66(9) of the 2008 Companies Act. See here S Luiz 'Executive remuneration and shareholder voting' (2013) 25 *SA Merc LJ* p.292.

that assurance results in an adequate and effective control environment and integrity of reports for better decision-making. It is recommended that the governing body should delegate to the audit committee the use of a combined assurance model to achieve, inter alia, an adequate and effective internal control environment and the integrity of information used for reporting and decision-making. The internal audit is also referred to and it has to provide strategic direction for independent direction and objective assurance on the adequacy and effectiveness of internal controls and risk and opportunity management.

Finally, Part 5.5 deals with stakeholders relationships.[47] Principle 16 states that in the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time.[48] Principle 17 deals with the responsibilities of institutional investors, linking it with CRISA. They should ensure that responsible investment is practices by the organisation to promote the good governance and the creation of value by the companies in which it invest.

The stakeholder approach advocated by *King IV* is that 'directors owe their fiduciary duties to the company and to the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered…. The company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. Thus, requiring of directors to act in good faith in the interest of 'the company' cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity… An interest that may

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[47] *King IV*, pp.71-73.

[48] This approach is in line with case law: *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 (6) SA 338 (WCC) where corporate governance was defined as '.. the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation.' See also: Lombard S, Joubert T 'The legislative response to the shareholders v stakeholders debate: A comparative overview' (2014) 14(1) *Journal of Corporate Law Studies* pp.211-240; Esser I, Delport PA 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 *Journal of Contemporary Roman Dutch Law* 1-30 at p.16; Esser I 'Corporate social responsibility: A company law perspective' (2011) 23 *SA Merc LJ* 317-335 at p.324.

be primary at one particular point of time in the company's existence, may well become secondary at a later stage'.[49]

3. King III and King IV distinguished

The main difference between *King III* and *King IV* is in its application and scope. As explained before *King IV* operates in terms of the 'apply and explain' approach based on 17 principles with practices which are linked to governance outcomes. The broad application of *King IV*, where the view is that all organisations should be able to follow the principles and strive to achieve the governance outcomes, is thus really the main difference. The sector supplements providing practices developed for specific sectors are therefore an addition compared to *King III*.[50] With regards to contents there are not many differences. A number of issues are, however, addressed in *King IV* to bring it in line with international developments and in line with the paradigm shifts referred to above. First, integrated thinking has been introduced in *King III* but it has evolved substantially through the work of the International Integrated Reporting Council. *King IV* is now in line with these international practices.[51] Secondly, with regard to the meaning and scope of independence when it comes to members of the governing body *King IV* goes beyond a mere checklist where no judgment is exercised. Thirdly, *King IV* provides new recommendations on the audit committee and auditor independence which is in line with the rule of 4 December 2015 of the Independent Regulatory Board for Auditors.[52] Fourthly, due to the Companies Act 71 of 2008 and its provisions on the social and ethics committee being in place for some time now the new *Code* expanded on the role of this committee.[53] Finally, on shareholder activism,

[49] This approach is taken from: I Esser and JJ Du Plessis (2007) 'The Stakeholder Debate and Directors' Fiduciary Duties' *SA MercLJ* p.346. Reference is also made to Esser and Delport 2016 *Journal of Contemporary Roman Dutch Law* pp.1-29 above.

[50] See *King IV*, part 6.

[51] See http://integratedreporting.org/.

[52] See http://www.irba.co.za/. In terms of this rule it is mandatory to disclose in the auditor' report the number of years for which the audit firm has been the auditor of the organisation. See *King IV*, Part 5.3, Principle 8, paras 51-59 for the relevant practices.

[53] *King IV*, Part 5.3, Principle 8, paras 68-70.

King III was written from the perspective of the governing body as the focal point of corporate governance. This is supplemented in *King IV* as it is required that the governing body of an institutional investor must ensure that the organisation responsibly manages its rights, obligations, legitimate needs, interests and expectations as the holder of the beneficial interest in the securities of the company.[54]

4. Analysis of King IV

King III was applied quantatively, in the sense that due to the principle of 'apply or explain', the focus was on 'ticking all the boxes'. While this may, in some or even in most cases, have had the effect that the spirit of *King III* was also complied with, it was not a satisfactory result as the focus was on compliance with the requirement and not on the effect of the requirement (the outcomes). It is difficult, if not impossible, to quantify outcomes like ethics and to empirically determine how the corporate citizenship of the company should be measured. As such the exercise of judgement by the governing body is required, hence the emphasis on corporate governance being a leadership matter. Furthermore, in an attempt to avoid a situation where the qualitative approach may become a way of escaping accountability for most principles, there is a recommended practice that requires disclosure of measures taken to monitor the specific aspect dealt with in the principle (e.g. corporate citizenship) and how the results of such monitoring were addressed. The reason why this is not found with all of the principles is because some principles do not lend themselves to such disclosure e.g. the board composition principle.

The outcomes of *King IV*, , i.e. ethical culture, good performance, effective control and legitimacy are measured qualitatively rather than quantatively, i.e. based on the result rather than the steps or means implemented to aim to achieve that result. The relationship between the board and executive management is also clearly defined in respect of this process. The board steers and sets the strategic direction with regard to the strategy and the way in which governance areas are approached and conducted. This is done by approving the policy and planning by management, overseeing and monitoring the implementation, ensuring accountability by means of reporting and disclosure, which can then again lead to a change in the strategic

[54] *King IV*, Principle 17.The underpinning philosophies of *King IV* are discussed in part 2, para 4.

direction. It is not sufficient that the annual financial statements have a paragraph or a note that states that all the principles have been complied with, like in *King III*. The level of the achievement of the outcomes must be explained in the integrated report and the integration applies to all that the company did, not only its financial results. As such *King IV* entails a change in the mind-set of the business and management of the company. In everything that is done or not done, the achievement of the principle must be present and be demonstrated. Therefore, if the principle is achieved, it will not be a disqualification if a particular practice has not been complied with. The mere fact, for example, that the chairperson of the board was previously the CEO, does not automatically mean, in contrast with *King III*, that there was not proper corporate governance. To an extent *King IV* is therefore more difficult to comply with. If the practices in respect of the principles are inadequate to give effect to the principles, the company and its governing body should put measures in place and develop and apply practices to attain those aspirations as per the principles.

In Part 2 *King IV* states that there is no need to disclose against the governance outcomes (ethical culture etc.) as it can be left to the user of the report to draw inferences from the narrative provided. However, *King IV* requires the governance outcomes to be always kept in mind in everything that is done because the final test of whether good governance is in place is whether the governance outcomes have been realised.

5. Conclusions and the way forward

King IV, as with most codes, is 'soft law' and 'enforcement' depends on many factors. It can, indirectly, be enforced in law as the basis on which it can be determined if the director has complied with the duties of care, skill, and maybe also diligence. In this respect *King IV* is not law, and does not prescribe, with a primary emphasis not on 'what' must be done, but rather 'how' it must be done. However, direct application of *King IV* is found in the regulations to the 2008 Companies Act.[55] In terms of reg 54 every prospectus must include a narrative statement setting out the extent to which, and manner in which, the company has applied the principles of the King Report and Code (defined in Reg 47(a) as 'the King Report on Governance for South Africa and

[55] R351 in *Government Gazette* 34239 of 26 April 2011.

the King Report and Code of Governance Principles (King III), as amended or replaced from time to time') and the reasons for any instance of not applying the recommended principles in the King Report and Code.[56] If the company is listed on a South African exchange, the listing requirements of the exchange may prescribe that the company must apply *King IV*. This, however, excludes companies that are not so listed as well excluding other organisations, as defined in *King IV*, such as municipalities, retirement funds, non-profit organisations, state-owned entities (as opposed to state-owned companies), trusts, voluntary organisations and other legal entities like universities. The onus to 'enforce' *King IV* would then lie with the investors and other stakeholders in the company or organisation who should, through potential disinvestment or failure to invest, be the incentive for the company or organisation to comply with *King IV*. This 'enforcement' works in two ways – on the one hand it will be mere non-investment or potential disinvestment to convince the company or organisation to comply with *King IV*, while on the other hand the benefits of complying with *King IV* will be such that it would be beneficial for the investors to invest in the company or to do business with organisation. The benefit can be financial or 'social', in the sense that the investor or the person doing business with the organisation will be seen to be a responsible 'citizen'. Apart from the CRISA, Principle 17 of *King IV* also expressly requires that institutional investors should ensure responsible investment to promote the good governance and the creation of value by the company in which it invests, which means, at least, that the company applies *King IV*. There has been a discernible movement away from the shareholder supremacy philosophy, but the legal principles underlying this philosophy are entrenched throughout company law and amendments thereto will, at this stage at least, be radical. The use of soft law, like *King IV*, will facilitate this shift in philosophy in a manner that will least impact the underlying company law philosophies.

[56] Non-compliance can result in civil and criminal statutory and common law sanctions. See ss 95 and 104 of the 2008 Companies Act and Piet Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) at pp.370 and 390.